No. 69-5046

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In the Supreme Court of the United States

OCTOBER TERM, 1970

~~NO. 5888~~

ROBERT APODACA, et al.,

Petitioners,

v.

STATE OF OREGON,

Respondent.

On Writ of Certiorari to the Court of Appeals of Oregon

BRIEF FOR RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1970

NO. 5338

ROBERT APODACA, et al.,

Petitioners,

v.

STATE OF OREGON,

Respondent.

On Writ of Certiorari to the Court of Appeals of Oregon

BRIEF FOR RESPONDENT

I. OPINIONS BELOW

Petitioners' recital is correct. The current citation for *State v. Gann* is 254 Or 549, 463 P2d 570 (1969).

II. JURISDICTIONAL STATEMENT

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

IV. THE QUESTION PRESENTED

V. STATEMENT OF THE CASE

Petitioners' statements of the jurisdiction of the court, the constitutional provisions involved, the question presented and the case, are accurate and respondent accepts them as its own.

VI. SUMMARY OF ARGUMENT

The Oregon law permits convictions in felony cases by a vote of ten of twelve jurors. That procedure is authorized by the Sixth and Fourteenth Amendments for these reasons:

I. Unanimity is not a necessary element of the Anglo-American jury system—

A. Because the unanimity requirement is an historical accident;

B. Because unanimity is no longer required in England and certain other Commonwealth jurisdictions;

C. Because the Anglo-American system has encouraged and accepted the illusion, not the reality, of unanimous verdicts; acceptance of substantial majority verdicts is more effective, less fictitious than other accepted devices; and

D. Because distinguished American legal groups have endorsed adoption of the substantial majority verdict procedure and five American states have modified the unanimity requirement.

II. Unanimity is not required by the Sixth Amendment because it was omitted from the Constitution and specifically deleted from the Sixth Amendment.

III. Unanimity is not required by the Sixth Amendment because it is not essential to the purpose of trial by jury—

A. Because a 10/12 verdict requirement is an adequately substantial shield against judicial or prosecutorial oppression;

B. Because 10/12 verdicts do not alter the requisite burden of proof beyond reasonable doubt;

C. Because 10/12 verdicts enjoy public confidence; and

D. Because allowance of 10/12 verdicts works by improving the administration of justice and facilitating the decisional process.

ARGUMENT

The Oregon Law

In 1931, the Crime Commission of Oregon,[1] charged by the legislature with the duty of investigating into the problems of crime in Oregon, recommended *inter alia* that the Constitution of Oregon be amended so as to allow for guilty verdicts, except in capital cases,[2] upon a vote of ten out of twelve jurors.[3]

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[1] The breadth of the philosophical spectrum of the eleven members is demonstrated by two of their number who later assumed federal posts, Wayne L. Morse and Dorothy McCullough Lee who became members, respectively, of the Senate and of the Subversive Activities Control Board.

[2] Capital punishment has since been abolished in Oregon. Oregon Constitution, Art. I, sec. 37 was repealed by vote of the people in 1964.

[3] Report of the Crime Commission of Oregon to the Thirty-Seventh Legislative Assembly of the State of Oregon (1931).

The constitutional amendment to allow verdicts of guilty or not guilty by ten out of twelve jurors in circuit court (the court of general jurisdiction) was adopted by vote of the people in May 1934. Oregon Constitution, Art. I, sec. 11 was thereby amended to read in relevant part:

> "In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; . . . . provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise; . . . ."

Each of the three petitioners in this consolidated appeal were found guilty by non-unanimous verdicts in the courts of Oregon and the federal constitutional validity of Art. I, sec. 11 of the Oregon Constitution is here in issue. The Oregon Supreme Court upheld the procedure against a Sixth Amendment challenge in the thoughtfully reasoned opinion of *State v. Gann*, 254 Or 549, 463 P2d 570 (1969) which is set out fully *post* at page 33.

The Issue as Framed in *Duncan* and *Williams*

At the turn of the century, the Supreme Court held that the Sixth Amendment right to jury trial was no

part of the Fourteenth. In *Maxwell v. Dow*, 176 US 581 at 605 (1900), the Court stated its holding that

> "it is in entire conformity with the character of the Federal Government that [the people of the states] should have the right to decide for themselves . . . whether there shall be a jury of twelve or a lesser number, and whether the verdict must be unanimous or not. These are matters which have no relation to the character of the Federal Government. *cf. Thompson v. Utah*, 170 U.S. 343 (1898)."

In *Duncan v. Louisiana*, 391 US 145 (1968) the Supreme Court held that the Fourteenth Amendment guarantees a right to trial by jury in state cases which, were they federal, would be tried by jury under the Sixth Amendment. The Court so held because "we believe that a fair trial by jury in criminal cases is fundamental to the American scheme of justice . . . ." The majority opinion traced the definition of due process, as applied to the right to jury trial, and reformulated it as follows:

> "The question thus is whether given this kind of system [as has developed contemporaneously in England and the United States] a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty." 391 US at 149-150.

In deciding that jury trial was necessary to the Anglo-American concept of ordered liberty, pains were taken not to imply a holding that the federal jury practice in all its particulars was being thrust upon the states. Mr. Justice Fortas in his concurring opinion stated the implicit limitation of the holding:

> ". . . I see no reason whatever, for example, to

assume that our decision today would require us to impose federal requirements such as unanimous verdicts or a jury of 12 upon the States. We may well conclude that these and other features of federal jury practice are by no means fundamental—that they are not essential to due process of law—and that they are not obligatory on the States.

"Neither logic nor history nor the intent of the draftsmen of the Fourteenth Amendment can possibly be said to require that the Sixth Amendment or its jury trial provision be applied to the States together with the total gloss that this Court's decisions have supplied." (There follows an excellent exposition of the value of diversity in the federal system.) 391 US at 213.

The case of *Williams v. Florida*, 399 US 88 (1970) confirmed that expression of the limitations of *Duncan*. The Fourteenth Amendment requires less than complete state-federal symmetry. A six member jury was held to satisfy the Sixth and Fourteenth Amendments. The Court stated the issue thus:

". . . . The relevant inquiry, as we see it, must be the function that the particular feature performs and its relation to the jury trial. Measured by this standard, the 12-man requirement cannot be regarded as an indispensable component of the Sixth Amendment.

"The purpose of the jury trial, as we noted in *Duncan*, is to prevent oppression by the Government. 'Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.' *Duncan v. Louisiana, supra*, at 156." 399 US at 99-100.

The inquiries in this case were thus framed in *Duncan* and *Williams*. The burden of this brief will be to demonstrate that the requirement of unanimity of verdict is not comprehended by the Sixth Amendment because:

(1) It is not a necessary element of the "Anglo-American regime of ordered liberty;"
(2) It was omitted from the Constitution and specifically deleted from the Sixth Amendment; and
(3) It is not essential to the accomplishment of the purposes of the right to trial by jury.

I. Unanimity is not a necessary element of the Anglo-American jury system

A. Because the unanimity requirement is an historical accident;

Although unsuccessful attempts have been made to explain the policy reasons for the requirement of unanimity in common law jury procedure,[4] the requirement appears to have been the same sort of "historical accident" as *Williams* determined the 12-men requirement to have been. 399 US at 89.

The unanimity rule derived from the Twelfth Century practice of *afforcement*. Early jurors were knights, then landholders, with personal knowledge, or its equivalent of the fact at issue. Twelve were assembled and new jurors were added until the requisite number of oaths in agreement were accumulated. Those who dis-

[4] See Ryan, *Less Than Unanimous Jury Verdicts in Criminal Trials*, 58 J Cr L C & P S 211, 212 (1967).

agreed were regarded as false and were rejected from the group. Thayer, *The Jury and Its Development*, 5 Harv L Rev 249, 261 (1892); Proffatt, Trial by Jury (1876) 113-115; Devlin, Trial by Jury (3 ed 1966) 8.

The requisite number of oaths to establish a fact increased with the gravity of the consequences of that fact. In the time of Henry II, twelve oaths were required to prove disseizin—jurors were free to disagree, but the accumulation of twelve oaths was required; five were required to prove payment of a written instrument; two were required to prove most facts in dispute. Forsyth, Trial by Jury (2 ed, Morgan rev. 1875) 197-198. Therefore, the rule had its origins as a means of proof rather than as a method for judging, much as today we require two witnesses to attest a will or to prove perjury.

The practice of accumulation of oaths became a requirement of unanimity as a result of the shift from witness-jurors to a fixed number of judge-jurors. Lord Devlin states it thus:

> "The rule makes a startling exception to the ordinary processes of English administrative life where decisions, even the most momentous, are almost invariably produced from a majority vote. Why is the verdict of a jury thought to require a degree of assent which for most purposes would be rejected as impracticable? The answer is that nobody ever planned it that way; the rule is simply an antique. Twelve witnesses were required to support the winning party and naturally for that purpose their testimony had to be unanimous; when the twelve witnesses were translated into judges, the unanimity rule, notwith-

standing that its original significance had then departed, remained with them. The rule was clearly settled in 1367, long before the jury was exercising any real judicial function; . . . ." Devlin, *supra*, at 48.

From at least the Sixteenth Century, the English common law generally required unanimity of its lay fact finders,[5] though the practice was otherwise in some of the American colonies. See *Williams v. Florida, supra*, 399 US at 98 fn 5.

Of course, that is not the end of the inquiry. As Mr. Justice Harlan said in his dissent to *Duncan v. Louisiana, supra*, at 172:

"The Due Process Clause of the Fourteenth Amendment . . . does not command adherence to forms that happen to be old . . . ."

B. Because unanimity is no longer required in England, and certain other Commonwealth jurisdictions;

The rule was never free from criticism. See, e.g. Proffatt, *supra* at 115; Forsyth, *supra* 208-209. The latter quotes Blackstone's contemporary, Professor Christian, as writing that: "the unanimity of 12 men, so repugnant to all experience of human conduct, passions and under-

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[5] Petitioners claim (Pet. Br 8, n 10) that a 1367 case established the principle that an 11-1 verdict could not be received. Forsyth, in his treatise on Trial by Jury, *supra*, at 199 cites two Sixteenth Century cases in which 11 man verdicts were received and the refractory juror imprisoned. Bro. Abr. Jurors pt 54, Fitz. Abr. verdict 40. Counsel was unable to translate either abridgement or find anybody who could, and therefore relies on Forsyth's rendition of the Norman English.

standings, could hardly in any age have been introduced into practice by a deliberate act of the legislature."[6]

The first of several institutional attempts to repeal the unanimity requirement was the Report of the Commissioners on Criminal Law (London 1830)[7] which observed that full discussion and consideration of minority views was essential, but that compromise and other factors operated to give more the illusion than the reality of unanimity. The observation is equally true today, see *post* p. 12. It therefore recommended that 8-4 or 9-3 verdicts be accepted after a minimum of twelve hours of deliberation designed to assure thorough deliberation.

That reform was finally accomplished in 1967. Parliament enacted the Criminal Justice Act of 1967, s. 13, which provides for a unanimous verdict until the com-

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[6] The pithiest critic was Jeremy Bentham in The Elements of the Art of Packing as Applied to Special Juries (London 1821), he noted that one need corrupt only a single juror, preferably "one, any one, gained and properly armed, armed with the necessary degree of *patience*," whereas under a majority system one so disposed would have the more difficult burden of corrupting a greater number. *Id* at 44.

Like Professor Christian, Bentham wrote:

> "If the *mode of forming verdicts* had been the work of calm *reflection*, working by the light of *experience*, in a comparatively *mature* and *enlightened age*, some number, certain of affording a *majority* on one side, *viz.* an *odd* number, would, on this as on other occasions, have been provided; and to the decision of that preponderating number would of course have been given the effect of the conjunct decision of the whole." *Id* at 45.

Bentham noted also that the unanimity rule "gives to any *one* of these jurors . . . the power of *all twelve*," particularly to that juror "whose power of *endurance is greatest*." *Id* at 47, 46. (Original emphasis throughout.)

[7] See Devlin, supra, at 51; Forsyth, supra at 208-209.

pletion of a minimum deliberation period of two hours, after which a verdict concurred in by ten jurors, or nine out of ten jurors, may be received:

"(1) Subject to the following provisions of this section, the verdict of a jury in criminal proceedings need not be unanimous if—
(a) in a case where there are not less than eleven jurors, ten of them agree on the verdict; and
(b) in a case where there are ten jurors, nine of them agree on a verdict;
and a verdict authorized by this subsection is hereafter in this section referred to as 'a majority verdict'.

"(2) A court shall not accept a majority verdict of guilty unless the foreman of the jury has stated in open court the number of jurors who respectively agreed to and dissented from the verdict.

"(3) A court shall not accept a majority verdict unless it appears to the court that the jury have had not less than two hours for deliberation or such longer period as the court thinks reasonable having regard to the nature and complexity of the case.[8]"

It should also be noted that 8/15th majority verdicts, without minimum deliberation time, are and always have been allowed in Scottish criminal cases, although civil verdicts must be unanimous. 5 Encyclopedia of the Laws of Scotland, *Crime* 255 § 621; McDonald, Criminal Law

[8] The arguments pro and con, with the author's statement of the con having a bit the better of it, are summarized in Samuels, *Criminal Justice Act*, 31 Modern Law Review 16, 24-27 (London 1968). Harking back to Jeremy Bentham, great stress was laid by the proponents upon the possibility of "nobbling" or jury tampering, a risk, which, while important, seems not sufficient in itself to justify the departure from previous practice.

of Scotland (4 ed, Mitchell rev 1929) 559. South Australia, Western Australia Victoria, Tasmania and Queensland allow 5/6th majority verdicts in non-capital cases despite a federal constitutional provision based upon the Sixth Amendment. See Pannam, *Trial by Jury and Section 80 of the Australian Constitution*, 6 Sydney L Rev 1, 2, 18 (1968).[9]

C. Because the Anglo-American system has encouraged and accepted the illusion, not the reality of unanimous verdicts. The majority verdict is more effective, less fictitious than other accepted devices;

The law can achieve the appearance, but not always the substance of unanimity. Unanimity is commonly an artificial condition among contentious, varying individual human beings. People are not unanimous unless they are forced to be—particularly so in this democratic era of broadly representative juries who decide cases after an adversary hearing designed to wrench their emotions and intellects one way, then the other, and then back again. See Forsyth, *supra*, at 204-206.

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[9] "To be sure, other jury systems operate quite satisfactorily without requiring a public verdict that is unanimous. The Scottish 15 man jury, for instance, as is well known, decides with a simple majority of votes. The 12 men juries on the European continent require usually a three-fourths majority for a finding of guilty; anything less acquits the defendant, there can be therefore no jury deadlock. An odd variant is probably the Brazilian jury which is not allowed to deliberate; at the end of the trial each juror is simply polled in writing, the votes are counted and the majority decides." Kalven & Zeisel, *The American Jury: Notes For an English Controversy*, 48 Chi Bar Rec 195, 201 fn (1967). See also von Moschzisker, Trial by Jury (2d ed 1930).

Given the requirement of unanimity despite the nature of the human animal, the law quickly developed the necessary devices to enforce unanimity even upon non-unanimous groups of people. Unanimity was as often as not the expression of coercion rather than of conviction. Proffatt, *supra*, at 114. From the beginnings into more modern times, physical force was employed.

In the Thirteenth Century, a dissentient juror was imprisoned or fined, Thayer, *supra* at 296-297, but that practice was soon discontinued as too harsh.[10] In the time of Edward III, there developed the short-lived practice of carrying an undecided jury in a cart to the next assize until they were agreed on a verdict. III Blackstone, Commentaries 376, Forsyth, *supra*, at 200, Devlin, *supra* at 50-51.

When imprisonment and kidnapping ceased, the law settled upon the method of compelling unanimous decision which prevailed until relatively recent times, denial of food and drink. In Elizabethan times it was customary for the prevailing litigant to celebrate his victory by entertaining the fatigued jury with supper, a practice which no doubt hastened successful deliberation. The device of abstinence was apparently still common in 1875, the time at which Forsyth wrote his treatise, Forsyth, *supra*, 200-201. In England, as late as 1858, a new trial was ordered because food and drink had been passed up to the jury on a string thus increasing

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[10] Although, see Thayer, *supra*, at 380-381 for similar practices extending into the Eighteenth Century.

the ability to endure without a unanimous decision. *Cooksey v. Haynes*, (1858) 27 Law J Rep (NS) Exch 371. The practice continued in England until passage of the Juries Act (1870) s. 23 which authorized the judge to allow jurors to purchase food and drink if they were unable to continue deliberations without it.

We no longer starve our juries into unanimous decision, but we employ subtle means to overcome the natural resistance to unanimity. Seventeen states allow the trial court to summarize the evidence for the jury, and eleven states and the federal system authorize the trial court to summarize and comment upon (i.e. evaluate for the jury) the evidence.[11] In a study of 101 cases in which the judge employed such controls, the jury failed to agree with the judge only once, and then by an 11-1 vote.[12] Neither practice is permitted in Oregon. Further, it is common practice in both England and the United States to give a so-called "dynamite" charge to break up a jury deadlock.[13] Despite careful phraseology, the clear implication of judicial desire and directive is apparent to the dissenting juror who hears the "Allen" charge.

Even in jurisdictions which are free from judicial comment or summary and from the "Allen" charge, every trial lawyer has often heard the standard admonition of

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[11] Kalven & Zeisel, The American Jury (1966) 420.

[12] *Id.* at 427.

[13] *Allen v. United States*, 164 US 492 (1396). The English version is set out in Devlin, *supra*, 52-53. The Oregon Supreme Court has not considered the practice.

the trial judge to a deadlocked jury to return to the jury room and continue their deliberations.

The deliberative process itself encourages the merger of differing opinions into the illusion of unanimity. Compromise is common where dollar amounts are involved, and it is clearly human nature to try to find middle ground. The minority will frequently come over after long deliberation because nobody wishes to be alone, because of the social undesirability of being thought of as obstinate, because it is ungracious to inconvenience one's companions, or simply to get home to one's family. See Barnet, *The Jury's Agreement—Ideal and Real*, 20 Or L Rev 189, 195 (1941); Forsyth, *supra* at 205-206; Osborn, The Mind of the Juror 166 (1937).

The structure of criminal law and procedure, with its lesser included offenses and, in some states other than Oregon, jury participation in sentencing, is particularly conducive to compromise verdicts wrapped in the appearance of unanimity. One commentator observed accurately:

> "In theory there are no compromise verdicts in criminal cases. Yet there are situations where the jurors may reach agreement just to end deliberation—not because all of them are convinced beyond a reasonable doubt that the defendant is guilty or innocent. Other opportunities for a compromise occur when the jury is permitted to find the defendant guilty of a crime within a crime. In both of these situations there is a possibility that the jurors will not reach true unanimity. Of course this possibility is always present but the chance is greater when an alternative conclusion is available to the jury." (Footnotes omit-

ted.) Comment, *Waiver of Jury Unanimity—Some Doubts About Reasonable Doubt*, 21 U Chi L Rev 438, 444 (1954) .

Were the law to steadfastly insist upon unanimity in all cases, it would be impossible to resolve issues expeditiously except in unusual cases. That is why the law has necessarily developed the various devices, *e.g.* lengthy sequestered deliberation, "dynamite" charges, structural encouragement of compromise, all designed to overcome the unlikelihood of spontaneous and voluntary unanimity.

The allowance of a verdict by a substantial majority is a direct, realistic and candid device to accomplish the same result as the forceful and fictitious practices just described. If realism is to be encouraged and fiction discouraged, then the law would do well to endorse the Oregon system which allows each juror to register his conviction, and to discourage the practice of forcing juries into artificial agreement by disguised pressures.

D. And because distinguished American legal groups have endorsed its qualification and four states have modified the unanimity requirement.

If unanimity is not a part, much less an essential part, of the Anglo side of the Anglo-American regime of ordered liberty, it also has less than unanimous acceptance on the American side.

The American Law Institute, Code of Criminal Procedure 137 § 355 (1931) provided the model for the Oregon constitutional provision:

> "In capital cases no verdict may be rendered unless all the jurors concur in it. In other cases of

felony a verdict concurred in by five-sixths of the jurors, and in cases of misdemeanor a verdict concurred in by two-thirds of the jurors may be rendered.①

"① These proportions are based on a jury of twelve. Where a jury may consist of less than twelve some other proportions may be thought advisable."

Most recently, the English Criminal Justice Act (1967) s. 13 was endorsed as a proper pattern for American practice in the report of the American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury, 25-28, § 1.1(d) (Approved Draft 1968). The reporters noted that the reduction of the number of mistrials caused by hung juries in an era when criminal justice is oft times denied by the delay of congested dockets, would be a significant improvement. The value of full deliberation and consideration of minority viewpoints within the jury room was appreciated, the report concluded that the two hour minimum deliberation time was sufficient to assure those purposes of the jury system. In sum, it concluded that the English model was a workable model for the conviction of the guilty and the protection of the innocent.

In practice, several American colonies had informal trial practices which included majority verdicts, *Williams v. Florida*, *supra*, at 98 fn. 45; Heller, The Sixth Amendment (1951) 16-18. Petitioners' Brief 19, recognizes that four states today use less than unanimous verdicts. Montana and Oklahoma allow three-quarters majority verdicts in misdemeanor cases, Louisiana allows

nine-twelfths verdicts in non-capital felony cases and Oregon allows ten-twelfths verdicts in non-capital felony and appealed misdemeanor cases. Also, Idaho allows five-sixths verdicts in misdemeanor cases, Idaho Constitution, Art. I, sec. 7. The unanimity requirement was not and is not unanimously accepted in the United States.

Conclusion regarding the Anglo-American regime of ordered liberty and the unanimity requirement

The unanimous verdict is clearly not a requisite component of "the Anglo-American regime of ordered liberty" because it is an historical accident, because it is not required in England or certain parts of the Commonwealth, and because, on the American side, five states do not require it and the two most prestigious American legal institutions have called for the allowance of majority verdicts in criminal cases.

II. Unanimity is not required by the Sixth Amendment because it was omitted from the Constitution and specifically deleted from the Sixth Amendment.

The American colonies did not automatically adopt unanimous jury verdicts as the means for resolution of criminal charges. Early in the colonial period, Connecticut eliminated the unanimity requirement and allowed simple majority verdicts with the judge empowered to break a tie. The requirement of unanimity was also eliminated in the Carolinas. In Pennsylvania, criminal trials were informal affairs, more like arbitra-

tion than trials, with six or seven man juries deciding by majority vote. The practice was otherwise in Maryland, Virginia and, later, North Carolina. Heller, The Sixth Amendment (1951) 16, 18, 22-23.

During the constitutional convention, an attempt was made to amend Article III section 2 by adding the words:

> "and a trial by jury shall be preserved as usual in criminal cases."

Opponents argued that the practice was so diverse among the states that "usual" had no meaning and the amendment failed. 5 Elliott, Debates on the Adoption of the Federal Constitution (1907) 550.

There was sufficient criticism of the new Constitution for failure to set forth the details of the right to trial by jury, that Hamilton deemed it desirable to explain the omission. In The Federalist Papers, No. 83, he wrote that it was impossible for the states to come to agreement and undesirable to set forth detail in the Constitution because the practice among the states was so diverse as to both subject matter and procedure. To illustrate the procedural differences, he described the practice of four eastern states which is of particular interest on the subject of unanimity:

> "There is an appeal *of course* from one jury to another til there have been two verdicts out of three on one side." (Original italics.)

Upon adoption of the Constitution, there were 103 requests for amendments originating from five states. Among them were expressions from New York, Virginia and, as petitioners point out, North Carolina, that unan-

imous jury trials should be guaranteed. Heller, *supra* at 29. North Carolina, incidentally, did not actually include the unanimity requirement in its requested amendments, but only in the preceding Declaration of Rights. 4 Elliott's Debates, *supra*, at 242-247. James Madison assumed the task of reformulating and submitting the proposed amendments to the Congress.[9]

Madison's proposal for an amendment, which ultimately became the Sixth Amendment, included specific reference to the unanimity requirement. It read:

> "The trial of all crimes . . . shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites . . . ."

The amendment passed the House of Representatives in substantially that form, but the Senate deleted every clause except that relating to grand jury indictment and presentment. Two days thereafter, a House motion to restore the unanimity clause, that is the original language except for the freeholder clause, failed of passage by an even vote. The Sixth Amendment in its present form was then approved by the House. Madison had tried in committee to restore at least the "accustomed requisites"

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[9] The majority opinion in *Williams v. Florida*, *supra*, at 94-97, relying heavily upon Heller, The Sixth Amendment (1951), sets out the legislative history of the Sixth Amendment fully. Counsel's research has only confirmed Mr. Justice White's account and added nothing consequential. Therefore, this brief will only summarize the pertinent parts of that account to demonstrate the deletion of the unanimity requirement from the Sixth Amendment, without repetition of the citations.

clause, but failed because of the diversity of procedure among the states.[18]

Thus the original draft of the Sixth Amendment specifically required unanimity, the requirement was specifically deleted by Congress and the restoration effort failed. The Sixth Amendment went successfully to the States for ratification with the unanimity clause stricken. For the Supreme Court to reinsert the requirement which the Congress specifically deleted, as petitioners urge, would be to judicially override the express votes of Congress and of the States in the drafting, submission and ratification of the Amendment.

III. Unanimity is not required by the Sixth Amendment because it is not essential to the purpose of trial by jury—

The purpose of criminal trials is to fairly determine the guilt or innocence of those persons whom the government has accused of crime.

The language of *Williams v. Florida, supra*, at 99-100, is here again important:

> "The relevant inquiry, as we see it, must be the function that the particular feature performs and its relation to the purposes of the jury trial. . . . .
>
> "The purpose of the jury trial, as we noted in *Duncan*, is to prevent oppression by the Government.

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[18] Pertinent to this case, Madison's letter to Pendleton, describing his difficulties with the eleven representatives of the states, continued:

> "The difficulty of uniting minds of men accustomed to think and act differently can only be conceived by those who have witnessed it."

'Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased or eccentric judge.' *Duncan v. Louisiana, supra*, at 156. Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence. . . . ."

A. Because a 10/12 verdict requirement is an adequately substantial shield against judicial or prosecutorial oppression;

The insistence of the colonists upon trial by jury without specification of the mode of jury trial illustrates their concern that they be subject to the mercies of their lay peers and not those of the judges. The contemporary distrust of judges is demonstrated by this denunciation of English judges:

"For two hundred years the judges in England sat on the bench condemning to the penalty of death, every man, woman and child who stole property to the value of five shillings and during that time not one judge remonstrated against the law." By John Bright, quoted by Henry James and, in turn, by Heller, *supra*, at 13.

The question, then, is whether a requirement that ten out of twelve jurors must concur to determine guilt or innocence, is a sufficient substantial interposited safeguard to prevent oppression. It clearly is.

First, it is important to note that unanimity *per se*

is not essential to such protection. It is but one means to assure the adequacy of protection against governmental arbitrariness. The importance of unanimity increases as the number of jurors diminishes.[16] The interposition of a jury of 100, 99 of whom must concur to convict, or of 1000 of whom 999 are required, would be a far more substantial safeguard than the requirement of six unanimous jurors which *Williams* allows, even though unanimity is not required.[17] Also, unanimity is clearly not essential to, or a guarantor of the quality of decision, *cf. Oregon* v. *Mitchell*, — US — (1970); *cf. Jacobellis v. Ohio*, 378 US 184 (1964). Therefore, the question is not whether unanimity is required, but rather whether the jury procedure in question, unanimous or not, is sufficiently substantial to perform its safeguard function and prevent governmental oppression.

Whether ten out of twelve is sufficiently substantial a shield is necessarily a subjective judgment. It is difficult to argue the merits beyond affirming or denying the proposition. It is significant, though, that England is satisfied that a 10/12 majority verdict is an adequate safeguard, Criminal Justice Act (1967) s. 13, and that the American Law Institute in 1931 and the American Bar

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[16] See, e.g., Tamm, *The Five-Man Civil Jury: A Proposed Constitutional Amendment*, 51 Geo L J, 120, 139-140 (1962).

[17] The argument reductio ad absurdum can go the other way: Should six jurors out of eleven be allowed to convict or acquit? Obviously not, because the simple majority is not sufficiently substantial an interposition to safeguard against oppression. We shall not attempt to draw lines. Oregon too can get off the "slippery slope" before it reaches bottom. *Cf. Williams*, n 28.

Association Project on Minimum Standards for Criminal Justice in 1968, both distinguished assemblages of legal scholars and practitioners,[18] endorse that proportion as being proper.

This Court held in *Williams* that the judgment of six men interposed between the accused and his government is a sufficiently substantial protection against oppression. The persuasion of ten men out of twelve, following a full and fair adversary hearing on the facts and appropriate instruction of law, that the guilt of the defendant has been proved beyond any reasonable doubt, provides a high hurdle for the prosecution to overcome. It belittles jurors to suspect that only two of twelve citizens would recognize governmental overstepping or that ten of twelve would accede to oppression. The requirement that ten members of the jury concur is at least an equally substantial protection as the six man jury authorized in *Williams*.

It is not necessary, as petitioners urge, to carve unanimity into the immutable granite of the Constitution in order to assure consideration of minority opinion in the jury room. The simple procedural device of a minimum period of deliberation—statutorily required in England and recommended by the ABA Project—will accomplish

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[18] To illustrate, on the ABA Project, Minimum Standards Relating to Trial By Jury was reported out of the Advisory Committee on the Criminal Trial chaired by the Hon. Walter V. Schaefer and reported by Professor Wayne R. LaFave. The report was approved by the Special Committee on Minimum Standards for the Administration of Criminal Justice chaired by the Hon. J. Edward Lumbard.

that purpose without giving to the scant minority the absolute power to prohibit decision. The minimum deliberation provision of the English Criminal Justice Act of 1967 has much merit—it seems inappropriate to resort to constitutional prohibition to accomplish what a simple remedial statute could more readily do.

B. Because 10/12 verdicts do not alter the requisite burden of proof beyond reasonable doubt;

Petitioners in brief echo the doubts raised by the Court in *Williams*: Does the reduction of the requisite proportion of jurors diminish the required standard of proof beyond reasonable doubt?[19]

The idea that proof beyond reasonable doubt requires that all twelve jurors concur,[20] is erroneous. The proposition confuses burden of proof and burden of persuasion.

"We intimate no view whether or not the requirement of unanimity is an indispensible element of the Sixth Amendment jury trial. While much of the above historical discussion [on the adoption of the Sixth Amendment] applies as well to the unanimity as to the 12-man requirement, the former, unlike the latter, may well serve an important role in the jury function, for example, as a device for insuring that the Government bear the heavier burden of proof. [citations]" *Williams v. Florida, supra*, 399 at 100 fn 46.

[19] Petitioner cites *Hibdon v. United States*, 204 F2d 834, 838 (6 Cir 1953) for the proposition. That case was decided upon two additional grounds: that the stipulation to a majority verdict was contrary to Rule 31 (a) FRCrP, the federal statutory requirement for unanimous verdicts; and that by requesting the defendant to stipulate to a majority verdict in the presence of the jury which had reported its deadlock, the judge compelled the defendant to involuntarily waive his right to unanimity. Particularly under the hard facts of the case, the latter two grounds stand up better than the "inextricably interwoven" paragraph cited at Petitioner's Brief 13. See *Fournier v. Gongalez*, 269 F2d 26 (1 Cir 1969).

If the dissenting vote of a juror meant that the state had failed in its burden of proof, then a hung jury would be the equivalent of an acquittal and a retrial would be double jeopardy. Of course, it is not. *Dreyer v. Illinois*, 187 US 71 (1902). In that situation, the state has simply failed to persuade, an entirely different burden than the burden of proof. Comment, *Waiver of Jury Unanimity —Some Doubts About Reasonable Doubt,* 21 U Chi L Rev 438, 441-443 (1954).

Whatever the vote of the jurors, the burden of proof beyond reasonable doubt remains constant. Whether that burden has been carried is a legal question for the court to determine at the end of the state's case on the defense motion for judgment of acquittal. If there is sufficient evidence from which proof beyond reasonable doubt may be inferred, the case goes to the jury. If not, the case is dismissed.

The burden of persuasion in a criminal case is that burden imposed upon the prosecution to convince the requisite number of jurors of the truth of the facts it seeks to prove. A decision by ten of twelve jurors in no way diminishes the state's burden of proof of guilt because each of those ten must be persuaded of guilt beyond a reasonable doubt.

Whether it is constitutionally sufficient to empower ten of twelve jurors to convict if they are persuaded beyond reasonable doubt, must be determined again in light of the purposes of the Sixth Amendment right to trial by jury: does that system interpose the common-

sense judgment of one's peers between him and his government to such a degree as will assure against an oppressive government. The persuasion of ten of twelve citizen-jurors beyond reasonable doubt is sufficient for the accomplishment of that constitutional purpose.

The Oregon Supreme Court answered that proposition realistically:

> ". . . . In our opinion a failure of one or two jurors to agree with the verdict of their fellow jurors is more likely to be caused by a failure of the dissenters to correctly understand the evidence or the court's instructions or by some extraneous cause having no relation to the quantum of proof. Proof beyond a reasonable doubt is not like a physical or chemical property the presence of which can be objectively ascertained. Unless the absence of proof is so conspicuous that a judge can hold 'as a matter of law' that proof beyond reasonable doubt has not been established, there is no test to determine whether such a degree of proof has been adduced. It does not appear that the nonconcurrence of one or two jurors signals such a defect." *State v. Gann*, 254 Or 549 at 563, 463 P2d 570 (1969). (Set out fully *post*, p. 33.)

We agree with petitioners that it is essential in our democracy that the jury be broadly representative of the community as a whole. *Williams* holds that a six-man jury is sufficient to assure such representation where there is no deliberate exclusion. While none should be excluded and each should be heard, it is clearly not essential to Anglo-American jurisprudence that each should have the power of veto.

C. Because 10/12 verdicts enjoy public confidence;

Finally, petitioners assert without demonstrating, that unanimity is essential if there is to be public confidence in the criminal process[20] (Petitioners' Brief 17), but the unanimity requirement is the chance product of the common law whereas the Oregon procedure was adopted by public referendum. If the public lacks confidence in the criminal justice system these days, it is surely not for the reason that 10/12 verdicts are allowed.

D. Because allowance of 10/12 verdicts works by improving the administration of justice and facilitating the decisional process.

While the primary and historic purpose of the jury system is to provide a shield, its primary function is to decide cases and to do so fairly, accurately and expeditiously. Oregon's modification of the unanimity pro-

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[20] Petitioners support their assertion with a beautifully expressed paragraph from von Moschzisker, supra, 299-300, about "general satisfaction and public contentment" and how a convicted felon will "accept the verdict with much better grace than one reached by a split jury." Von Moschzisker obviously speaks the feelings of an earlier age. His authority seems rather diminished by his next argument justifying the unanimity requirement: that it is necessary for the preservation of our system of private property. He adopts as "well said" the following quotation from Joseph L. Choate:

> "Imagine a jury aroused to even just indignation by the oppression, or even misconduct, of a rich individual or gigantic corporation against an unfortunate plaintiff, and not restrained by the cooler sense and judgment of the three or four most conservative or intelligent of their number, and you can easily foresee what havoc they would make with the rights of property." *Id* at 300-301.

There is too much rhetoric and too little analysis on this issue.

cess removes several impediments to the decisional process without doing injury to its safeguard role.

The most common impediment to the decisional process is the possibility of mistrial because of one or two jurors prevent decision.[8] While prisoners languish and accused defendants on bail operate under a cloud awaiting a trial date which is delayed by congested dockets, while the public is prey to untried professional criminals, while the correctional process is rendered ineffective in part because of its remoteness in time from the commission of the crime, and while court administrators strive merely to retard the accelleration of delay in the criminal courts, mistrials and retrials are a luxury society can ill afford. It is reported that states with unanimity requirements suffer a 5.6% mistrial rate whereas in states which allow non-unanimous verdicts the rate is reduced to 3.1%. That constitutes a 45% reduction in the number of mistrials due to deadlock. Kalven & Zeisel, The American Jury (1966) 461. A reduction of the waste of judicial time and resources by 45% is a significant achievement in the administration of criminal justce. Oregon jury procedure is one substantial reason that Oregon's dockets, and particularly those of Multnomah County (Portland), are among the most current in the nation.

Another impediment which, since before the time

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[8] Actually, it appears that the chances are greater that a potential acquitting jury will hang than that a convicting one will do so. See Kalven & Zeisel, The American Jury (1966), Table 127 at 462, based upon a sampling of 156 cases.

of Jeremy Bentham, occurs occasionally but is discovered rarely, is jury tampering. It is particularly a threat in the prosecution of organized crime. *Cf. Hoffa v. United States*, 385 US 293 (1966); *Osborn v. United States*, 385 US 323 (1966). The substantial majority verdict system renders jury tampering extremely difficult, although Hoffa attempted to fix more than two, and unlikely of success.

The Oregon system succeeds. Nowhere does Petitioners' Brief complain of unfairness or oppression or insufficiency of proof either generally or in the cases at bar. Critics of the system have not pointed to failures of justice under it. *Cf.* Kirkpatrick, *Should Jury Verdicts Be Unanimous in Criminal Cases?*, 47 Or L Rev 417 (1968). Kalven and Zeisel, in recommending against English adoption of the substantial majority verdict system, acknowledged:

> ". . . . And then there is, of course, the State of Oregon which allows the very 10:2 and 11:1 verdicts which the Criminal Justice Bill proposes for England, and justice in Oregon has not broken down; but then also nobody has ever claimed that Oregon justice is superior to justice elsewhere." Kalven & Zeisel, *The American Jury, Notes for an English Controversy*, 48 Chi Bar Rec 195, 201 fn (1966).

Due process, of course, does not require that Oregon justice be superior to justice elsewhere. It requires only that Oregon justice meet Anglo-American expectations of fairness, expedition, reliability and respect for individual freedom. Oregon process meets those expectations in a manner which, judging from the action of

Parliament and the recommendations of the American Bar Association Project and the American Law Institute, may provide a laboratory model for the future development of criminal procedure. Absent some showing of injustice or unfairness, and the petitioners have made none, the Oregon procedure should be upheld as constitutionally permissible.

CONCLUSION

The Oregon judgments should be affirmed.

Respectfully submitted,

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APPENDIX

STATE OF OREGON, *Respondent, v.*
TIMOTHY EARL GANN,
Appellant.
254 Or 549, 463 P.2d 570 (1969)

DENECKE, J.

The defendant was convicted of holding a person as a hostage within the Oregon State Penitentiary. Subsequently, an information of previous convictions was filed and the defendant was sentenced to life imprisonment. He appeals.

I

1. The defendant contends that he was convicted in violation of the sixth and fourteenth amendments to the Federal Constitution because he was convicted by a verdict of ten of twelve jurors.[1]

In 1934 the people of Oregon amended the Oregon Constitution as follows: "* * * [P]rovided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise; * * *." Oregon Constitution, Art I, § 11.

Prior to the amendment of the Oregon Constitution the United States Supreme Court held that the Sixth Amendment required that in federal trials the jury consist of twelve men and stated that the jury verdict in such cases must be unanimous. *Thompson v. State*

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[1] "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *." U. S. Const., Amend. VI.

"* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amend. XIV, § 1.

of Utah, 170 US 343, 351, 353, 18 S Ct 620, 42 L Ed 1061 (1898). A similar view was also expressed in *Maxwell v. Dow,* 176 US 581, 586, 20 S Ct 448, 494, 44 L Ed 597 (1900). However, in the latter case it was held that the Constitution of the United States, including the Due Process Clause of the Fourteenth Amendment, did not require the states to try criminal cases with a jury and did not prohibit a state from providing that a jury in noncapital criminal trials would consist of eight jurors instead of twelve. Hence, the Oregon constitutional provision was not thought to present any problem either at the time of its adoption or for many years thereafter.

The decisions of *Duncan v. Louisiana,* 391 US 145, 88 S Ct 1444, 20 L Ed2d 491, rehr den 392 US 947, 88 S Ct 2270, 20 L Ed2d 1412 (1968), and *Bloom v. Illinois,* 391 US 194, 213, 88 S Ct 1477, 20 L Ed2d 522 (1968), have recently caused uncertainty as to the validity of Art I, § 11, of the Oregon Constitution. Those cases overruled *Maxwell v. Dow,* supra (176 US 581), and its successors and decided that the right to a trial by jury in a criminal case, as guaranteed in federal trials by the sixth amendment to the Federal Constitution, is guaranteed in state trials by the Due Process Clause of the Fourteenth Amendment.

In the case at bar, the defendant and the dissent argue that defendants in state criminal trials can be convicted only by a unanimous twelve-man jury verdict because the Sixth Amendment has been held to require a unanimous verdict by a jury of twelve men in federal criminal trials, and the Sixth Amendment right to a jury trial is now applicable to the states by way of the Fourteenth Amendment.

It should be noted, however, that it has not been held that all the aspects of the right to a jury trial in federal criminal cases apply identically to state

criminal trials. Mr. Justice White, writing for the majority in *Duncan v. Louisiana,* supra (391 US 145), observed at 158, note 30, that Louisiana asserted that if trial by jury is made mandatory on the states, all the incidents of trial by jury which have previously been held to be guaranteed by the Sixth Amendment in federal trials will also be mandatory. Mr. Justice White did not answer this contention, but rather stated that the *Duncan* decision would not require widespread changes in the laws of the states. He gave as a reason for this statement: "First, our decisions interpreting the Sixth Amendment are always subject to reconsideration * * *." 391 US at 158. Also, Mr. Justice Fortas specially concurring in the majority decision stated:

> "But although I agree with the decision of the Court, I cannot agree with the implication, see *ante,* at 158-159, n. 30, that the tail must go with the hide: that when we hold, influenced by the Sixth Amendment, that 'due process' requires that the States accord the right of jury trial for all but petty offenses, we automatically import all of the ancillary rules which have been or may hereafter be developed incidental to the right to jury trial in the federal courts. I see no reason whatever, for example, to assume that our decision today should require us to impose federal requirements such as unanimous verdicts or a jury of 12 upon the States. We may well conclude that these and other features of federal jury practice are by no means fundamental—that they are not essential to due process of law—and that they are not obligatory on the States." See *Duncan v. Louisiana,* supra (391 US at 162). *Bloom v. Illinois,* supra (391 US at 213).

In our opinion, the case of *De Stefano v. Woods* (*Carcerano v. Gladden*), 392 US 631, 88 S Ct 2093, 20 L Ed2d 1308 (1968), decided after *Duncan v. Louisiana,* supra (391 US 145), and concerning a ten-

to-two Oregon verdict does not offer any indication of how the Court will decide the question of unanimity. The Court held that *Duncan v. Louisiana,* supra (391 US 145), did not apply because the trials were held before that decision. During the current term the Court has again used the same approach. In *De Backer v. Brainard,* 396 US 28, 90 S Ct 163, 24 L Ed2d 148, decided November 12, 1969, the appellant asked the Court to rule that a jury trial was constitutionally required in state juvenile proceedings. The Court instead held that *Duncan v. Louisiana,* supra (391 US 145), would not be applied to juvenile proceedings held before the decision in *Duncan v. Louisiana,* citing *De Stefano v. Woods.* We cannot find in either decision any indication of how the Court would decide the question which the Court avoided answering.

The contention that the Fourteenth Amendment requires a unanimous verdict of twelve jurors is unacceptable for two principal reasons: (1) its cornerstone, the decision that the Sixth Amendment requires a twelve-man unanimous verdict, was reached by a sterile historical approach to the Bill of Rights which is now—and in our opinion very correctly—usually ignored by the United States Supreme Court; and (2) the "right" in issue, a unanimous verdict rather than a verdict by ten of the twelve jurors, is not of sufficient consequence to be fitted with constitutional rigidity.

In *Thompson v. Utah,* supra (170 US 343), the defendant was convicted of a felony by a twelve-man jury in the Utah territorial court. The defendant obtained a new trial. Utah became a state and the second trial was in a Utah state court. As provided by Utah law, an eight-man jury tried and convicted the defendant. A majority of the Court held that because the crime had been committed in the territory of Utah,

federal law applied and the Sixth Amendment required a trial by a twelve-man jury and by dictum stated that unanimity was required of the twelve jurors.

Mr. Justice Harlan, writing for the majority, cited the Magna Charta, Hale, The History of the Pleas of the Crown, Bacon's Abridgment, all to the effect that the common law required a twelve-man unanimous jury and, therefore, the Sixth Amendment so required.

Mr. Justice Harlan was relying upon the same principle of constitutional construction that he stated in his dissent in *Hurtado v. People of California,* 110 US 516, 542, 4 S Ct 111, 28 L Ed 232 (1884). He there quoted from *Murray v. Land & I Co.,* 59 US 272, 276-277 (18 How 1855):

> "'* * * To what principles are we to resort to ascertain whether this process enacted by Congress is due process? To this the answer must be two-fold. We must examine the Constitution itself to see whether this process be in conflict with any of its provisions. If not found to be so, we must look *to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.*'" 110 US at 542.

For amplification of Mr. Justice Harlan's views on due process see Johns Hopkins University Studies in Historical and Political Science, 59-82 (1915).

Mr. Justice White in *Duncan v. Louisiana,* supra (391 US at 151, n 16), pointed out that Mr. Justice Harlan was historically inaccurate in stating that the Magna Charta was the origin of the guarantee of a right of trial by jury. Historians now are in general

agreement that the right of trial by jury was not one of the rights wrung from King John in Magna Charta. Clark, *Magna Carta and Trial by Jury,* 58 Am L Rev 24 (1924).

Nevertheless, Mr. Justice Harlan was probably correct that a twelve-man unanimous verdict was the practice in England as well as the colonies in the latter 18th Century. Historians now, however, generally believe that both the requirements of twelve jurors and of unanimity evolved by accident.

Sir Patrick Devlin writes:

> "This leads naturally to a consideration of the unanimity rule. The rule makes a startling exception to the ordinary processes of English administrative life where decisions, even the most momentous, are most invariably produced from a majority vote. Why is the verdict of a jury thought to require a degree of assent which for most purposes would be rejected as impracticable? The answer is that no one ever planned that it should be that way; the rule is simply an antique. Twelve witnesses were required to support the winning party and naturally for that purpose their testimony had to be unanimous; when the twelve witnesses were translated into judges, the unanimity rule, notwithstanding that its original significance had then departed, remained with them. * * *" Devlin, Trial by Jury 48 (1956).

Accord, Proffatt, Jury Trial, 114-115 (1877), and Lesser, History of the Jury System, 188, note 30 (1894), but for a somewhat different version, see 197, note 42. Proffatt has still another theory of origin, which also has no relationship to the modern rule of unanimity.

An accident of English history is not a firm foundation for a cornerstone of American constitutional law; nevertheless, a majority of the United States Supreme Court continued to search English legal his-

tory to determine the scope of the American constitutional guarantee of trial by jury. The ultimate may have been reached in *Dimick v. Schiedt*, 293 US 474, 55 S Ct 296, 79 L Ed 603, 95 ALR 1150 (1935). The majority held that a federal district court violated the Seventh Amendment guaranteeing a jury trial in civil cases because the trial court set aside a verdict in an automobile damage case on the ground that the damages awarded were insufficient. Mr. Justice Stone, joined by Mr. Chief Justice Hughes and Messrs. Associate Justices Brandeis and Cardozo, dissented and by his statement of the question revealed the sterility of the majority's reasoning:

"* * * The question is a narrow one: whether there is anything in the Seventh Amendment or in the rules of the common law, as it had developed before the adoption of the Amendment, which would require a federal appellate court to set aside the denial of the motion merely because the particular reasons which moved the trial judge to deny it are not shown to have similarly moved any English judge before 1791.

"The Seventh Amendment commands that 'in suits at common law,' the right to trial by jury shall be preserved, and that 'no fact tried by a jury shall be otherwise re-examined by any court of the United States, than according to the rules of the common law.' Such a provision of a great instrument of government, intended to endure for unnumbered generations, is concerned with substance and not with form. There is nothing in its history or language to suggest that the Amendment had any purpose but to preserve the essentials of the jury trial as it was known to the common law before the adoption of the Constitution. For that reason the Court has often refused to construe it as intended to perpetuate in changeless form the *minutiae* of trial practice as it existed in the English courts in 1791. From the beginning, its language has been regarded as but subservient to the single purpose of the Amendment, to preserve the

essentials of the jury trial in actions at law, serving to distinguish them from suits in equity and admiralty, see *Parsons v. Bedford,* 3 Pet. 433, 446, and to safeguard the jury's function from any encroachment which the common law did not permit." 293 US at 490-491.

2. In an earlier decision, a majority of the Court, Mr. Justice Harlan dissenting, expressed the same repugnance of the sterile historical method of construction:

"* * * But to hold that such a characteristic [it must be part of the English common law and suited to the American colonies] is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians." *Hurtado v. People of California,* supra (110 US at 528-529).[2]

The United States Supreme Court has on occasion continued to bolster the grounds for their decisions

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[2] Our recent decision in Cornelison v. Seabold, 254 Or 401, 460 P2d 1009 (1969), construing the Oregon constitutional protection of civil jury trials, might be construed as following this same sterile approach. We believe there is a distinction. The Oregon Constitution was not intended to guarantee jury trials in all civil proceedings; therefore, it is appropriate to inquire into historical practice to find a basis for distinguishing between civil cases requiring a jury and others not requiring one. In addition, "* * * the constitutional right of trial by jury is not to be narrowly construed, and is not limited strictly to those cases in which it had existed before the adoption of the Constitution, but is to be extended to cases of like nature as they may hereafter arise." State v. 1920 Studebaker Touring Car, 120 Or 254, 263, 251 P 701, 50 ALR 81 (1927). Hence, the attention to history in *Cornelison,* supra, was in accordance with the general task of the Oregon Supreme Court to determine which civil proceedings among those not set forth in the Constitution require jury trials. The court has an entirely different function in determining the scope of the trial by jury in criminal proceedings guaranteed by the United States Constitution.

by citing English legal history. *Fay v. Noia,* 372 US 391, 83 S Ct 822, 9 L Ed2d 837 (1963). They have not, however, in recent years, decided constitutional rights on the basis of English and colonial practices in 1791. When legal history may not support the Court's view of what the constitution should mean today it has made no reference to history. The change in the application of the right against self-incrimination as contained in the Fifth and Fourteenth Amendments is an example of the latter.

In 1908 when *Twining v. New Jersey,* 211 US 78, 29 S Ct 14, 53 L Ed 97, was decided the court apparently wholeheartedly subscribed to the historic approach—a fundamental question being, what was the common law of England in 1791 and what parts of it were well accepted in the colonies just prior to the American Revolution? The majority disagreed with Mr. Justice Harlan upon the answer to that historical question. The majority concluded that the privilege against self-incrimination was not a part of due process of law as practiced in England and the colonies, but rather, was merely a principle of the law of evidence. The majority held, therefore, that neither the Fourteenth Amendment by itself nor the Fourteenth Amendment incorporating the Fifth Amendment required the states to observe the right against self-incrimination.

Malloy v. Hogan, 378 US 1, 84 S Ct 1489, 12 L Ed2d 653 (1964), overruled *Twining v. New Jersey,* supra (211 US 78); however, neither the majority opinion nor the dissenting opinions mention the practice in England or the colonies. The Court held that a right is protected by the Due Process Clause if it is "'a fundamental right, essential to a fair trial.'" *Malloy v. Hogan,* supra (378 US at 6), quoting *Gideon v. Wainwright,* 372 US 335, 343-344, 83 S Ct 792, 9

L Ed2d 799, 804-805, 93 ALR2d 733 (1963). Whether such a right existed in England and had been adopted by the colonies by 1791 can, at least at present, be considered only important to historians.

If the historical approach is to prevail and a decision rendered by a judge on the assizes in the reign of Edward III determines the fundamental rights of Americans in 1969, other English and colonial practices, some less acceptable than a unanimous verdict of twelve, may rear up through the cobwebs and dust and claim similar recognition.[9]

In England, in the colonies, and in many of the states, a jury was required to be composed only of white male property owners. Devlin, supra, at 17; Lesser, supra, at 181-183; General Laws of Oregon 1843-1872, § 918, p 290. The United States Supreme Court undoubtedly would not hold that the Fourteenth Amendment requires the exclusion from juries of all persons other than white male property owners. However, based upon pure logic, if a unanimous verdict of twelve is required merely because that was the English practice adopted in the American colonies, it would seem to follow that jurors are, for the same reason, required to consist solely of property owners who are white and male.

The dissent concludes that in addition to being historically required, the right to be convicted only by a unanimous jury is a fundamental right.

The most plausible argument in support of the unanimity requirement is to the effect that, since one can be convicted only upon being found guilty beyond a reasonable doubt, a nonunanimous jury verdict cannot result in conviction because the disagreement with

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[9] Proffatt states that a decision in the time of Edward III held that a verdict of less than twelve was a nullity. Proffatt, Jury Trial, 113 (1877).

a guilty verdict by one or two of the twelve jurors is sufficient to establish that there is reasonable doubt as to the guilt of the defendant. Proffatt held this view. Proffatt, supra, at 117.

We respectfully decline to adopt this view. In our opinion a failure of one or two jurors to agree with the verdict of their fellow jurors is more likely to be caused by a failure of the dissenters to correctly understand the evidence or the court's instructions or by some extraneous cause having no relation to the quantum of proof. Proof beyond a reasonable doubt is not like a physical or chemical property the presence of which can be objectively ascertained. Unless the absence of proof is so conspicuous that a judge can hold "as a matter of law" that proof beyond a reasonable doubt has not been established, there is no test to determine whether such a degree of proof has been adduced. It does not appear that the nonconcurrence of one or two jurors signals such a defect.

3. We interpret the decisions of the United States Supreme Court to hold that due process requires the use of those procedures which are so fundamental that their absence impairs or discredits the fact-finding process. *Gideon v. Wainwright,* supra (372 US 335), is an example. We conclude that the absence of the unanimity requirement does not impair or discredit the fact-finding process.

The United States Supreme Court has specifically held that the right to be convicted only by a unanimous jury verdict is not "a fundamental right." The Republic of Hawaii had a system of criminal procedure which provided that indictment be by a judge, not a grand jury, and that nine of twelve jurors could return a verdict. When Hawaii ceded to the United States, the question of whether such provisions were

contrary to the United States Constitution was presented. The Court held they were not unconstitutional:

> "* * * We would even go farther, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the island, and well calculated to conserve the rights of their citizens to their lives, their property and their well-being." *Hawaii v. Mankichi,* 190 US 197, 217-218, 23 S Ct 787, 47 L Ed 1016 (1903).

Thirty-five years of practice have shown the Oregon procedure to be suited to Oregon conditions. The evidence, so far as we have been able to observe, is that the Oregon system has been as just as the system in jurisdictions requiring a unanimous verdict. Observers favoring unanimous verdicts concede that the lack of a unanimous requirement has not broken down justice in Oregon. Kalven and Zeisel, *The American Jury*, 48 Chi Bar Record 195, 201 (1967).

If unanimity were a "fundamental principle" of due process, "essential to a fair trial," one would expect harmony of opinion concerning the desirability of unanimity as a procedure, if not as a constitutional requirement. There is no such concord.

Unanimity has been attacked in the land of its birth, England, for over 100 years. The English constitutional historian Hallam stated the most repeated denunciation. He termed unanimity, "that preposterous relic of barbarism." Hallam, The Middle Ages (Supp), notes p 262, quoted with approval in Lesser, supra, at 187.

The Commission on the Courts of Common Law, appointed in 1830 as a result of the law reform movement of Bentham and others, reported: "'The interests of justice seem manifestly to require a change of law upon this subject [unanimity],'" quoted in Lesser, supra, at 187, note 28.[9] Reform took a little time; however, the requirement of unanimity was finally abolished by the Criminal Justice Act 1967, § 13.

Since the English are not supposed to treasure trial by jury as do we Americans, the recent abolition of the unanimity requirement by the English Parliament may not have significance for this country. However, criticism of unanimity as a desirable policy has been as great in the United States. Oregon's first legal scholar, Judge Mathew Deady, wrote:

> "But by far the greater portion of the unsatisfactory results of trial by jury is directly due to the perversion and abuse of the institution, brought about by improper legislation and practices concerning the selection and formation of juries, and the conduct of a trial with them. The most serious of these are:—
>
> "1. The rule requiring unanimity in the verdict of a jury;
>
> "* * * * *
>
> "The rule requiring a verdict to be the unanimous opinion of the jury ought to be changed, so that a majority may give a verdict." Deady, *Trial by Jury,* 17 Am L Rev 398, 400-401 (1883).

More recent and less provincial is the official draft of the American Law Institute's Code of Criminal Procedure, § 355, published in 1931:

> "In capital cases no verdict may be rendered unless all the jurors concur in it. In other cases of felony a verdict concurred in by five-sixths of the jurors, and in cases of misdemeanor a verdict con-

[9] It is not completely certain they were referring to criminal trials.

curred in by two-third of the jurors may be rendered."[6]

4. In addition to all the considerations before mentioned, we must remember that we are passing upon a provision of the Constitution of the State of Oregon. We consistently hold that we will "declare no act of the legislature void unless invalidity be shown beyond a reasonable doubt." *State v. Anthony,* 179 Or 282, 301, 169 P2d 587, cert den 330 US 826, 67 S Ct 865, 91 L Ed 1276 (1946); *State v. Collis,* 243 Or 222, 231, 413 P2d 53 (1966). Certainly, at least as much of a presumption of validity should be given to the State Constitution.

Because of the absence of any decision of the United States Supreme Court directly to the contrary, because the people of Oregon were acting within their power to regulate the incidents of criminal procedure when they adopted Art I, § 11, and because a unanimous verdict is not a "fundamental right, essential to a fair trial," we hold that the Oregon Constitution is not in violation of the Fourteenth Amendment.

[The judgment was reversed on other grounds, the discussion of which is omitted.]

GOODWIN, J., concurring in part and dissenting in part.

I dissent only from that part of the majority opinion which refuses to apply the federal interpretation of the Sixth Amendment to the State of Oregon.

For the first seventy-five years of its history, Oregon, in company with all the states except Louisiana, required a unanimous verdict in felony cases. Then,

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[6] Apparently, few states adopted the Institute's recommendation. Oregon, sometimes in the vanguard of legal reform, is an exception. Mr. Justice White states that only Oregon and Louisiana now permit less than unanimous verdicts. Duncan v. Louisiana, 391 US 145, 158, n 30, 88 S Ct 1444, 20 L Ed2d 491, rehr den 392 US 947, 88 S Ct 2270, 20 L Ed2d 1412 (1968).

in 1934, the people of Oregon amended Article I, § 11, of the state constitution. The principal reason stated for the amendment was that its adoption would tend to eliminate the evil of the hung jury and the consequent expense of the new trial.① There was no organized opposition to the referendum, and it passed. As noted by the majority, there was little reason to question the federal constitutionality of the 1934 amendment until *Maxwell v. Dow*, 176 US 581, 20 S Ct 448, 44 L Ed 597 (1900), was overruled by *Duncan v. Louisiana*, 391 US 145, 88 S Ct 1444, 20 L Ed 2d 491 (1968).

Duncan v. Louisiana, supra, has now held that trial by jury is fundamental to the American scheme of justice and that the Due Process Clause of the Fourteenth Amendment guarantees trial by jury to criminal defendants in state courts. While the court in *Duncan v. Louisiana* stopped short of a specific holding that a jury trial in a state court must be conducted according to federal standards, a subsequent per curiam opinion dealing in part with an Oregon case strongly suggests that state trials commenced after the date of *Duncan* must conform to federal standards, one of which requires a unanimous verdict to convict. *De Stefano v. Woods,* 392 US 631, 88 S Ct 2093, 20 L Ed 2d 1308 (1968).

When a state's own constitution is challenged as repugnant to the federal constitution, the state court should lay aside its presumptions favoring the constitutionality of statutes generally, and decide the federal supremacy question in light of the controlling precedents of the United States Supreme Court. See,

① The possibility that there might be a corrupt juror is sometimes tendered as an additional reason for eliminating the requirement of unanimity. See Kirkpatrick, *Should Jury Verdicts Be Unanimous in Criminal Cases?*, 47 Or L Rev 417, 421 (1968), for a well-reasoned statement of the case for unanimity.

e.g., *Reitman v. Mulkey,* 387 US 369, 87 S Ct 1627, 18 L Ed 2d 830 (1967). Accordingly, I believe the time has arrived for Oregon to recognize that the right to a unanimous jury verdict in a criminal trial is so fundamental to liberty under the American scheme of justice as to amount to a due-process right. I believe that our state constitution is out of step with the United States Constitution as the Sixth Amendment has been interpreted by the United States Supreme Court.

In contrast to the Oregon amendment allowing a verdict by a jury which contains unconvinced jurors, the federal system has always regarded the unanimous verdict as an essential ingredient of the Sixth Amendment's guarantee of a jury trial. *Thompson v. Utah,* 170 US 343, 350-351, 18 S Ct 620, 623, 42 L Ed 1061, 1066-1067 (1898); *Maxwell v. Dow,* 176 US at 586, 20 S Ct at 450-451, 44 L Ed at 599; *Patton v. United States,* 281 US 276, 288, 50 S Ct 253, 254, 74 L Ed 854, 858, 70 ALR 263 (1930); *Andres v. United States,* 333 US 740, 748, 68 S Ct 880, 884, 92 L Ed 1055, 1065 (1948).

The origin of the unanimity rule is not universally agreed upon. However, it is undisputed that for more than five centuries Englishmen knew that they could not be convicted of crime except by the unanimous verdict of twelve peers.[9] 1 W. Holdsworth, His-

[9] Recent legislation in England provides for a ten-to-two verdict in criminal cases. Criminal Justice Act of 1967, § 13. According to H. Kalven & H. Zeisel, *The American Jury: Notes for an English Controversy,* 48 Chi B Rec 195 (1967), Introductory Note, the legislation was the result of a discovery that there had been jury bribery in a few widely publicized criminal cases. This change was also suggested in this country in ALI Code of Criminal Procedure, § 355 (1931). However, with regard to felony cases, it was rejected in all the American common-law jurisdictions except Oregon. See the equivocal comments to Section 1.1(d) of the American Bar Association Standards Relating to Trial by Jury (Approved Draft 1968).

tory of the English Law 318 (3d ed rewritten 1922). Moreover, by the time of the American Revolution, the protection of unanimity in criminal cases was one of the Englishman's most cherished rights. See 4 Blackstone, Commentaries *349–*350. And see W. Forsyth, History of Trial by Jury 210–215 (new ed Morgan 1876); M. Hale, History of the Common Law 293 (and note at 299) (Runnington ed 1779); J. Thayer, Preliminary Treatise on Evidence at the Common Law (1898).

There is no reason to believe that the American colonists who adopted our Bill of Rights abandoned their English tradition with respect to trial by jury. Indeed, the evidence strongly suggests that the Sixth Amendment guarantee of a jury trial in all criminal cases was intended to incorporate all the elements of a jury trial that were deemed protective of individual liberty in this country and in England when the Constitution was adopted.

> "* * * Those elements were—(1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous." *Patton v. United States,* 281 US at 288.

And see *Andres v. United States,* 333 US 740; *Maxwell v. Dow,* 176 US 581; *Thompson v. Utah,* 170 US 343; all supra.

Several important functional advantages result from the unanimity rule. If at least one juror disagrees with the majority, his opinion and the reasons for it must be heard and considered by the majority. He cannot be ignored, because until the majority persuades him to accept their view no verdict can be

returned. This undoubtedly decreases the likelihood of precipitancy and increases the opportunity for a full and adequate discussion of every issue about which there is reasonable doubt. Kalven & Zeisel, *The American Jury: Notes for an English Controversy,* 48 Chi B Rec 195, 201 (1967).

A guilty verdict in which only a majority of the jury can concur strongly suggests that the jury contains persons who are not convinced of the prisoner's guilt. Indeed, it may contain jurors who are firmly convinced of the person's innocence. These unpersuaded jurors may be merely incorrect; or they may be less susceptible to passion and prejudice than the majority, and therefore correct. It was to this latter point that Mr. Justice Story referred when he added the following footnote to a discussion of the reason for the institution of trial by jury:

> "A trial by jury is generally understood to mean * * * a trial by a jury of *twelve* men, impartially selected, who must *unanimously* concur in the guilt of the accused before a legal conviction can be had. Any law, therefore, dispensing with any of these requisites, may be considered unconstitutional." 2 J. Story, Commentaries on the Constitution of the United States § 1779, note 2 (5th ed 1891).

Judge Story said that the "object of trial by jury in criminal cases is, to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people. Indeed, it is often more important to guard against the latter than the former * * *." Id. at § 1780. Thus, because it requires the concurrence of the unimpassioned and the unprejudiced, the protection of unanimity increases the likelihood that the guilt of the accused will truly be established beyond a reasonable doubt.

The distinction between liberty and property has made some commentators, such as W. Forsyth, oppose the unanimity rule in civil cases, but wholeheartedly endorse it in criminal cases. W. Forsyth, supra at 210.

It may be argued that the state no longer prosecutes religious and political heretics, or at least that political and religious dissent is protected by the First Amendment, and that the citizen no longer needs the additional guarantee of his liberty which is provided by the unanimous jury.

Similarly, it may be argued that the criminal defendant in modern times has so many other constitutional protections that, regardless of the nature of the crime of which he is charged, he need have no fear of an unjust verdict by a majority of twelve of his fellow citizens so long as the jury is impartial.

It has been argued, as noted, that the requirement of unanimity allows irrational, perverse, or dishonest jurors to "hang juries," thereby obstructing justice and putting the state to the unnecessary expense of multiple trials. This argument, however, is unsupported by objective data, even though 48 states and the federal judicial system refused to follow Oregon's lead and have adhered to the unanimous-verdict rule.

However, assuming some validity in one or more of the arguments against unanimity, the fact remains that if a citizen can be convicted by only a majority (or, in Oregon, by a statutory fraction) of the jury, he has less protection than he had at common law. If Oregon can constitutionally provide for a ten-to-two verdict, it can, with equal constitutionality, provide for a verdict by a simple majority.

A local law making it easier for the state to convict is not necessarily bad. But a local law which deprives a person of a right that is fundamental to due

process of law cannot stand. Since the only kind of verdict recognized by courts operating under the Federal Constitution is the unanimous verdict, I am forced to conclude that unanimity has been held to be fundamental to federal due process. If there is no federal constitutional requirement of unanimity, there is, of course, no federal standard at all, except "fair procedure," for measuring the compliance of the various states with the demands of due process. I find it difficult to believe that the United States Supreme Court will permit fifty states to decide for themselves what constitutes a Sixth Amendment trial by jury.

Neither this court nor the United States Supreme Court has ever departed from common-law antecedents in order to take away a constitutional safeguard of personal liberty. It is true that we no longer insist that a jury be made up of male white property owners. But none of those common-law qualifications for jury service evolved to protect individual liberty. The unanimity rule is related directly to liberty.

In 1967, this court summarily denied habeas corpus relief to Frank Anthony Carcerano, who had belatedly challenged his 1962 conviction of armed robbery on the ground that the jury had been instructed on the ten-to-two verdict, in violation of the Federal Constitution. Before the United States Supreme Court on a petition for a writ of certiorari to the Supreme Court of Oregon, Carcerano subsequently advanced the argument that the Oregon jury trial had denied him due process of law under the United States Constitution. The United States Supreme Court granted certiorari, but eventually held that it need not decide the constitutional question in Carcerano's case because Carcerano had been tried before the publication of the decision in *Duncan v. Louisiana,* supra. *De Stefano v. Woods,* supra. In view of the specific holding that

Duncan v. Louisiana is not retroactive, and in view of strong suggestions in *De Stefano v. Woods* and more recently in *DeBacker v. Brainard*, 396 US 28, 90 S Ct 163, 24 L Ed 2d 148 (1969), that *Duncan v. Louisiana* would apply to future cases like the one at bar, I would prefer a decision today granting new trials in those relatively few cases in which guilty verdicts were rendered by divided juries after May 20, 1968, the date of the decision in *Duncan v. Louisiana,* supra. The majority is inviting a wholesale jail delivery several years from now if the United States Supreme Court adheres to the policy considerations recently applied in *Desist v. United States*, 394 US 244, 249, 89 S Ct 1030, 22 L Ed 2d 248 (1969), and holds that Oregon has been bound by *Duncan v. Louisiana* since the date it was decided.

I dissent, therefore, from the part of the majority opinion upholding the ten-to-two verdict.

McAllister and O'Connell, JJ., join in this concurring and dissenting opinion.